

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 v.)

6 REAZ QADIR KHAN,)

7 Defendant.)

No. 3:12-cr-659-MO-1

June 10, 2014

Portland, Oregon

8
9
10
11
12
13 **Oral Argument**

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE MICHAEL W. MOSMAN

16 UNITED STATES DISTRICT COURT JUDGE
17
18
19
20
21
22
23
24
25

APPEARANCES

FOR THE PLAINTIFF: Mr. Ethan D. Knight
Mr. Charles F. Gorder, Jr.
United States Attorney's Office
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204

FOR THE DEFENDANT: Ms. Amy M. Baggio
Baggio Law
621 S.W. Morrison, Suite 1025
Portland, OR 97205

Mr. John S. Ransom
Ransom Blackman, LLP
1001 S.W. Fifth Avenue, Suite 1400
Portland, OR 97204

COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR
United States District Courthouse
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8188

1 (P R O C E E D I N G S)

2 THE COURT: Go ahead.

3 MR. KNIGHT: Good afternoon, Your Honor. We're
4 present in the matter of the United States v. Reaz Khan.
5 This is Case No. 12-cr-00659. Ethan Knight and Charles
6 Gorder, appearing on behalf of the Government. Mr. Khan is
7 present, out of custody, with counsel Amy Baggio and Jack
8 Ransom.

9 We're here today, Your Honor, on four defense
10 motions. Preliminarily, I'll let the Court know I will be
11 addressing any questions or argument related to defendant's
12 motion to disclose taint procedures and protocols, as well
13 as defendant's motion relating to release of the hard drive.
14 Mr. Gordon will be addressing the other two motions.

15 THE COURT: Thank you.

16 MS. BAGGIO: Good afternoon, Judge Mosman.

17 Your Honor, as mentioned by Mr. Knight, the Court
18 has three motions scheduled for argument today: the motion
19 for disclosure, which is court reference 64; the motion for
20 defense counsel access, court record 68; and a motion for
21 preservation of evidence, which is court record 67.

22 In addition, my co-counsel filed a motion for
23 release of evidence that appears in the record as court
24 record 85. And with the Court's permission, we would like
25 to address that here today as well.

1 THE COURT: That's fine.

2 MS. BAGGIO: Thank you, Your Honor.

3 THE COURT: Give me just a moment here.

4 (There is a pause in the proceedings.)

5 THE COURT: I'm just going to have that printed.

6 Go ahead.

7 MS. BAGGIO: Thank you, Your Honor.

8 As to the motion to preserve evidence, I don't
9 have anything to argue to our -- in addition to our paper
10 submissions, other than I wanted to update the Court
11 regarding the case of *Jewel v. NSA* that was cited in our
12 motion at page 3.

13 And just to update the Court, in the past few days
14 it has come out in the media reports that despite the
15 Court's order of preservation in that case, there was a
16 continuation of destruction of evidence. And I mention that
17 only because I think that that further illustrates the need
18 for this Court's intervention as to defendant's request for
19 preservation of evidence.

20 But other than that, I didn't have anything else
21 to add, unless the Court has questions.

22 THE COURT: Let's start with that. I'm sorry,
23 I've forgotten which of you is arguing preservation.

24 MR. GORDER: I'm the designated hitter on that,
25 one, Your Honor.

1 THE COURT: All right. The core of your position
2 is that the request is overbroad. Is there then an
3 agreed-upon body of evidence that might normally be subject
4 to destruction of some kind but which you acknowledge would
5 be suitable for preservation as a sort of a criminal
6 litigation hold in this particular case?

7 MR. GORDER: Your Honor, that's a difficult
8 question, I think, to answer in a logical way. This is a
9 criminal case that was investigated by the FBI. And in
10 connection with that, there was surveillance done through
11 the Foreign Intelligence Surveillance Act by the FBI. A lot
12 of the details of that obviously are classified, but
13 including the minimization and retention instructions that
14 come from the Attorney General and the Foreign Intelligence
15 Surveillance Court.

16 I am confident -- we are confident in our
17 discussions with the FBI that the materials that the FBI
18 gathered during the course of this investigation will not be
19 destroyed, just like in any other criminal case really. I
20 mean --

21 THE COURT: When you say materials gathered,
22 you're not limiting it to those materials that the
23 prosecution team or others think is relevant for trial;
24 you're saying all materials gathered pursuant to the
25 principal investigation here by the FBI on this subject --

1 MR. GORDER: Yes.

2 THE COURT: -- are going to be retained and not
3 subject to otherwise standard destruction?

4 MR. GORDER: I'm confident that in this particular
5 case, under the facts that we have -- some of which are
6 classified -- that that is true.

7 Now, I am not saying that about other agencies of
8 the Government, particularly in the intelligence community
9 or the Department of State or wherever that might have a
10 piece of paper with the defendant's name on it or some kind
11 of a data point with his telephone number or name or
12 whatever. With what we have gathered with the FBI in this
13 particular case, we're confident that under the rules that
14 we're operating under, we can comply with *Brady* and Rule 16
15 and the other rules of discovery.

16 THE COURT: I see the defense motion as what might
17 be thought of as requesting three circles of information.
18 One you've just described, the core information, all of it,
19 acquired in the FBI investigation through FISA procedures,
20 or otherwise, of this target, Mr. Khan here in this case.

21 The second is other agencies' efforts, at least as
22 contemplated by the defense pleadings in this case, as
23 supposed predicate groundwork for this investigation that
24 led to this FBI investigation. They would also seek
25 retention of that material, and they have specifically

1 written about the possibility of CIA or NSA investigations
2 that led to this investigation.

3 And the third is what you just referenced, which
4 is everything else; that is, is there anything else anywhere
5 by any agency doing anything at all that has Mr. Khan's name
6 on it.

7 What about the second set of materials I just
8 discussed? We've talked about the first one. How about the
9 second one?

10 MR. GORDER: With regard to the second one, Your
11 Honor, we have done our due diligence as best we can to seek
12 out what we felt were the relevant other agencies and made
13 particularized requests to them of information relevant to
14 this case.

15 Now, the identity of those agencies are
16 classified. The results that we got back from them, if any,
17 are classified, but we have done our best to identify what
18 we thought was anything that would be discoverable in this
19 criminal case, and I've taken steps to either deal with it
20 in some way, either get it declassified or otherwise make,
21 you know, a considered judgment about it.

22 THE COURT: What concerns me about your written
23 response to this portion of the defense motions was it
24 seemed to make the argument that it was sort of FBI or
25 nothing; if it wasn't the FBI, then you were under no

1 obligation to retain it.

2 I'm not sure that's the answer you've just given
3 me. The answer you've just given me seems to suggest that
4 you've tried to draw the circle to include if there are any
5 other agencies' investigative materials that could be viewed
6 as part of the chain of investigation that led to this
7 indictment, whether it's the FBI or not.

8 So I sort of suggested that you have given me a
9 different answer than what you have in your pleadings. Am I
10 wrong about that, or if I'm right, which is the better
11 answer?

12 MR. GORDER: Maybe I'm not being clear, Your
13 Honor. We believe that our discovery obligation lies
14 primarily with the FBI as the investigative agency in this
15 case. We have made some inquiries to other agencies who are
16 not necessarily part of the investigative team in the case.
17 What we found, if anything, in those inquiries that we
18 thought was discoverable obviously will be retained as part
19 of the criminal case, but I don't want to say that, you
20 know, any particular intelligence agency either did
21 something that led to this investigation or otherwise. I
22 mean, it wasn't just did they lead to this investigation; it
23 was whether they had any relevant discoverable evidence,
24 whether it came before the investigation, during the
25 investigation, or afterwards.

1 THE COURT: Thank you.

2 Do you wish to be heard further?

3 MS. BAGGIO: Your Honor, I don't think I do. I
4 think our position was set forth in the papers.

5 THE COURT: All right. Well, I'm going to issue
6 my ruling in terms of these sort of three groups of
7 materials that I just discussed. And the Government has
8 said that it is confident that materials from the FBI
9 investigation of this particular case leading to this
10 indictment and these charges will be retained and not
11 otherwise destroyed according to what at least some
12 declassified opinions or non-FISC opinions -- I'm thinking
13 of California, for example -- have described as document
14 retention protocols that result in periodic destruction of
15 documents or evidence.

16 That's the competition: document retention for
17 litigation and subsequent appeal and normal -- I'm using the
18 word "document" broadly, I guess here, to include anything
19 that's retained -- document destruction according to
20 standard protocols, and in fact, as we've seen from some
21 declassified material, document destruction that can be
22 ordered by courts so that the failure to destroy becomes a
23 violation of court order. That's the competition.

24 The Government has said that with regard to the
25 core body of evidence, which is the FBI's investigation of

1 this case through FISA or otherwise, those materials will be
2 retained, not destroyed. And I agree that that's necessary
3 and appropriate here, and therefore I also order it. In
4 addition to the Government being confident of it, I order
5 that they be retained.

6 I do so for a couple of reasons. One is the
7 typical reasons one might have in almost any case, FISA or
8 otherwise, for the retention of potentially relevant
9 materials that would otherwise be destroyed, and that is
10 that it might become only clearer later in the litigation or
11 even on appeal that something is important.

12 And the other, candidly, is that we are in a state
13 of flux about what will be disclosed or not disclosed.
14 Certainly Congress is debating amendments to FISA protocols
15 and otherwise. And I can appreciate how counsel in the
16 position of the defense counsel here might want to preserve
17 the pool of evidence even just for the possibility that down
18 the line what was previously undiscoverable later becomes
19 discoverable by statutory amendment. So those are the
20 reasons I'm ordering retention.

21 I think the same rationale applies to other
22 investigative material that directly led to this
23 investigation. By "directly," I mean they involve the same
24 events and are fairly thought of as the same chain of
25 investigative efforts that led to this indictment. So I do

1 not intend to include in that the third category of
2 materials I described, which is just anything any agency
3 ever acquired that mentions Mr. Khan.

4 And so to the degree I've been able to be precise,
5 I'm ordering retention of the first two bodies of material
6 but not the third.

7 I recognize that absolute precision is not
8 possible here, since we can't describe with precision the
9 sorts of materials we're talking about or even the agencies
10 that might possess them. So let me just state that the
11 principle I'm operating on is that I'm ordering retention of
12 the sorts of things from which one might conceivably acquire
13 *Brady/Giglio* type of evidence or other evidence that might
14 get at defense motions that attack the evidence or the
15 charges in this case.

16 So *Brady/Giglio* is one issue, but there remains,
17 for example, issues of violations of statutory protections,
18 for example, that could result in motions. So you mentioned
19 one of the things that you were confident would be retained
20 were any protocols in play for acquisition of evidence. And
21 I agree with those also, not just interview reports or the
22 like, but those sorts of things -- because they could result
23 in acquisition of information that would lead to defense
24 motions that could successfully attack the charges -- also
25 need to be retained.

1 That's the first of your motions that you took up.
2 The next one?

3 MS. BAGGIO: Thank you, Your Honor. May I step to
4 the podium?

5 THE COURT: Yes.

6 MS. BAGGIO: Your Honor, as to the remaining two
7 motions that I'm addressing today, I prepared an argument
8 that addresses them together because I believe they are,
9 part and parcel, somewhat the same in a way.

10 Before I do address the argument, I wanted to
11 address a -- something I raised in the notice of a
12 supplemental exhibit filed on Friday, Footnote 1. I stated
13 that although I previously stated there would be no need for
14 live witness testimony, we believe we might need to call the
15 case agent at today's hearing.

16 Upon further reflection and in consultation with
17 the prosecution team, we won't be asking to do that today,
18 Your Honor. The defense will rely on the previously
19 submitted exhibits, the paper exhibits, in support of the
20 motion for disclosure and for attorney access. So I wanted
21 to raise that first.

22 And second, as to the notice of the supplemental
23 exhibit that was filed on Friday, I refer to that as a
24 supplemental exhibit. It may have been better cast as
25 Defendant's Exhibit I to the motion for disclosure, because

1 I had previously provided A through H, and this would have
2 been the next one in the series. So either way, I just
3 wanted to make clear this would be a subsequent exhibit to
4 the exhibits previously filed along with the motion for
5 disclosure.

6 THE COURT: Can I make sure that I have clear in
7 my mind what you're seeking by these two motions?

8 MS. BAGGIO: Yes, sir.

9 THE COURT: I understand the motion for disclosure
10 to be disclosure of basically minimization procedures and
11 taint team protocols used by the prosecution in this case.
12 Are you seeking more than that in the motion for disclosure?

13 MS. BAGGIO: The second thing we're seeking, Your
14 Honor, is disclosure of the existence of additional
15 privileged communications that have been obtained.

16 THE COURT: Right. That's clear, I think, from
17 your pleading. I didn't mention it.

18 And then the motion for access is -- also seems
19 fairly specific to me. You want to have produced to you in
20 some form or be able to review any in-camera ex parte filing
21 in response to your motion for disclosure?

22 MS. BAGGIO: That's correct, Your Honor.

23 THE COURT: All right. Go ahead.

24 MS. BAGGIO: Thank you.

25 Your Honor, what I'd like to do is begin with the

1 areas in which I believe the parties agree. And of course
2 the Government can correct me if I get this wrong, but I
3 believe we agree on four primary things. First of all, the
4 intrusion into a privileged communication can form the basis
5 of either a motion to suppress that evidence or potentially
6 a motion to dismiss the case.

7 Secondly, I believe there's an agreement that the
8 January 2010 phone call that was recorded between Mr. Khan
9 and Attorney No. 1 is a privileged communication.

10 Third, I believe there's also agreement that the
11 January 2012 communications between the defendant and
12 Attorney No. 2 also constitute privileged communications.

13 And fourth, I believe there's agreement that
14 defense interviews of potential defense witnesses constitute
15 privileged work product.

16 There are two things on which we don't agree,
17 however, and I believe what we do not agree on is whether
18 further disclosure is warranted of either the existence of
19 additional privileged communications in the possession of
20 the Government, somewhere within the Government; and
21 secondly, the disclosure of the minimization procedures or
22 filter team protocol that underlie past, present, or future
23 monitoring, in that we are seeking disclosure of those
24 procedures in order to assess further litigation.

25 First I'd like to address our request for

1 disclosure of the possession of additional privileged
2 communications. Your Honor, the defense has already
3 established that the prosecution team is in possession of
4 and has accessed the content of privileged communications.

5 Now, the Government will neither confirm nor deny
6 the existence of additional privileged communications, but
7 states that any -- if I understand them correctly, any
8 privileged communications in its control or possession have
9 been disclosed to us.

10 What I think is important to note, Your Honor, is
11 that we see the potential of three different places where
12 these privileged communications may be. Number one would be
13 privileged communications within the possession of the
14 prosecution team. Full disclosure of those is necessary
15 because it is material to possible motions to suppress or
16 dismiss the indictment.

17 THE COURT: Would that -- in your view, would
18 possession of that sort of privileged material be in
19 contravention of the statements made that they've produced
20 everything that they have?

21 MS. BAGGIO: Yes. But I believe, Your Honor --

22 THE COURT: What I'm really asking is do you
23 believe there are ways for the prosecution team to possess
24 privileged material that somehow represents possession of
25 them without their earlier statement being false?

1 MS. BAGGIO: No, Your Honor. And I don't have a
2 reason to believe that there's been a false statement
3 either. I want to make that clear. I just want to -- I'm
4 trying to illustrate the three different places where I
5 believe that the privileged communications may exist.

6 THE COURT: Right. And I'm only asking the
7 question because I understand you to be suggesting that even
8 though the Government has made these assurances, that
9 doesn't preclude the possibility that there are privileged
10 communications being held elsewhere.

11 MS. BAGGIO: Correct.

12 THE COURT: Even if their representations to you
13 are true.

14 MS. BAGGIO: Correct.

15 THE COURT: So you're really saying two
16 things: there are places these privileged materials can be
17 held even if what they've assured you is true; and then
18 there's the possibility that they, the prosecution team
19 itself, also has them.

20 MS. BAGGIO: That's correct.

21 THE COURT: What are the areas -- Let's go on to
22 the others, then.

23 MS. BAGGIO: And as to the others, as I understand
24 it, the communications could be with the filter team; and if
25 the communications are with the filter team and have been

1 successfully walled off from the prosecution team, it's our
2 position that disclosure of the existence of those
3 communications is still warranted because if the
4 minimization procedures have been operating properly, those
5 communications wouldn't have arrived at the filter team
6 itself and would have been screened off before they arrived.

7 And then lastly, there would be the possibility of
8 additional communications that were obtained by some other
9 agency, recordings of a privileged nature that exist with
10 some other agency. And I believe, Your Honor, that that
11 last type of communication gives us particular pause because
12 of the international nature of this case and the facts
13 underlying it.

14 I want to focus on for a moment of this threat of
15 future monitoring. The defense exhibit --

16 THE COURT: Let me ask first --

17 MS. BAGGIO: Yes, sir.

18 THE COURT: -- what happens with each of the three
19 others if in fact it turns out that it's true -- the first
20 one I think I know. You've learned that the prosecution
21 team has privileged or work product communications -- let's
22 stick with privileged for a minute -- that they have them.
23 And I think you've already identified what you would do with
24 that. You could either seek to suppress them and/or seek to
25 use it as a basis for a motion to dismiss.

1 What do you do if you learn that the taint team
2 has privileged communications? And I guess, by definition,
3 you get suppression because that's what the taint team
4 de facto does, and you could get that de jure, I guess,
5 also. But what else happens?

6 MS. BAGGIO: Well, I think, Your Honor, the fact
7 of the existence of privileged communications that either
8 ended up directly in the hands of the prosecution team or
9 perhaps by virtue of the May 29, 2014 letter which described
10 at least the disclosure of content of the January 2012
11 communications establishes the fact that there's a problem
12 in the minimization procedure, and therefore this would give
13 basis to a motion to challenge the minimization procedures
14 as approved by the Court or as executed by employees of the
15 executive branch.

16 THE COURT: And the third one, I'm not sure what
17 you're contemplating there.

18 MS. BAGGIO: May I --

19 THE COURT: Who is it that acquires privileged
20 communications that falls within your third example?

21 MS. BAGGIO: If I may offer an example, Your
22 Honor. For example, Ali Jaleel, who is an unindicted
23 co-conspirator in this case, is from the Maldives, his
24 family still lives in the Maldives. As I understand the way
25 the Government has publicly explained its monitoring under

1 the FISA Amendments Act, Section 702, the Government
2 identifies valid foreign intelligence targets, and the
3 Government can then monitor communications from that target
4 or to that target.

5 And as discussed in the Privacy Committee
6 Oversight, PCL -- I'm sorry, Privacy Civil Liberties
7 Oversight Board, cited in our materials, March 19th of this
8 year, it seems that not only "to" communications and "from"
9 communications but also they capture "about" communications.

10 So let's assume for a moment that Ali Jaleel is a
11 valid foreign target. If I communicate with an
12 individual -- perhaps a relative of his in the Maldives --
13 about Ali Jaleel under the Government's publicly explained
14 process of correctly identifying valid foreign targets, the
15 Government could obtain that communication from me, a U.S.
16 citizen, to a non-U.S. citizen. They refer to the fact that
17 my communication has been obtained as an incidental
18 collection, but when that communication is going to convey
19 attorney -- I'm sorry, attorney work product, that's the
20 concern that we would have.

21 As described by the FISC review court in its 2002
22 decision, there is an encouragement of that information,
23 when helpful, to be shared from the intelligence side of the
24 Government with the law enforcement side of the Government.
25 And that gives rise to our concern.

1 I think that was also, as detailed in our papers,
2 discussed during the hearings on March 19th, that if it's
3 helpful and if it's evidence of a crime -- which, arguably,
4 if I put my prosecutor hat on, I may say that a
5 communication between counsel and a relative of unindicted
6 co-conspirator to discuss where the co-conspirator was or
7 wasn't in 2008 or 2009 would be evidence of a crime.

8 And that's why we're raising this. I can tell you
9 from my perspective that threat has had a severely chilling
10 effect on the way we're undertaking our investigation.

11 THE COURT: Go ahead.

12 MS. BAGGIO: So the threat of future monitoring,
13 what we just discussed is really No. 2 on this list, the
14 communications with individuals abroad who may be subject --
15 subjects of monitoring under the FISA Amendments Act.

16 But also, we can go back to No. 1, communications
17 with --

18 THE COURT: Can I ask just a clarifying question
19 then?

20 MS. BAGGIO: Yes.

21 THE COURT: Is your concern limited to future
22 monitoring that could result in privileged communications by
23 U.S. agencies?

24 MS. BAGGIO: That's correct.

25 THE COURT: So, for example, you're not raising

1 here in this motion whatever might be the case or might not
2 about the government of Pakistan engaging in its own
3 investigation of these events?

4 MS. BAGGIO: That's correct.

5 THE COURT: All right.

6 MS. BAGGIO: So as to the first, communications
7 with local individuals currently being targeted by the
8 federal government, we have no qualms if the Government has
9 a valid monitoring order issued by the FISC to monitor an
10 individual's communications. That is not our business and
11 I'm not raising -- standing on behalf of that person. But
12 as evidenced in our exhibits, the problem arises when
13 potential defense witnesses are themselves the subjects of
14 separate targeting orders.

15 We have -- in our investigation we've interviewed
16 several people, many of whom have been interrogate --
17 questioned by federal law enforcement officers and some who
18 reported that they were even on the no-fly list for some
19 period of time. This has given rise to concerns on our part
20 that we would be able to engage in investigation and
21 communications with them without those communications being
22 disclosed to the prosecution team.

23 And the last threat of future monitoring, Your
24 Honor, is the fact that --

25 THE COURT: I just want to be clear on your

1 position, then. I mean, I understand that you're concerned
2 that if there's another investigation and you communicate
3 with a subject of that investigation, that that conversation
4 between you or your investigator and, from your perspective,
5 witness -- but from someone else's perspective, target --
6 that that communication makes its way to the FISC
7 prosecution team. I get that.

8 Are you also challenging just the acquisition of
9 such conversations if they never make it to this prosecution
10 team?

11 MS. BAGGIO: No, sir. And I think our evidence in
12 this case raises the possibility that it can happen, and so
13 we're asking for disclosure of whatever the process is that
14 is designed to prevent that dissemination of information to
15 this prosecution team.

16 THE COURT: All right. Thank you.

17 MS. BAGGIO: And the last threat of future
18 monitoring relates to the fact that -- excuse me -- that
19 Mr. Khan is in regular contact with his defense team by
20 telephone and email. And I think it's reasonable after one
21 is indicted for a crime like this, that maybe there is
22 continued monitoring as to his communications.

23 Again, apart from the questions of whether or not
24 that might be a just order, my concern here, Your Honor, is
25 the possibility that the monitoring would obtain our

1 privileged communications, and I'm asking for disclosure of
2 whatever the protocol or procedure is to prevent
3 dissemination of those communications.

4 THE COURT: Does your argument about privilege
5 include work product?

6 MS. BAGGIO: Yes.

7 THE COURT: Every time you said "privilege," you
8 mean both?

9 MS. BAGGIO: Yes, sir.

10 So those are the types of communications that we
11 would like to know if they exist, if they're in the
12 possession of the Government, but we're also
13 seeking disclosure of the processes, both the minimization
14 procedures --

15 THE COURT: I don't mean to interrupt you. I'm
16 sorry, but I just want to be clear.

17 Your argument up to this point has actually asked
18 for two things: One is disclosure of past collections of
19 privileged or work product communications in a variety of
20 possible silos. But you're also seeking for me to do
21 something to guard against the possibility and to prevent
22 future -- at least disseminations if not collections, right?

23 MS. BAGGIO: That's correct, Your Honor.

24 THE COURT: You're not asking for disclosure of
25 that, you're asking for something that would prevent it from

1 happening?

2 MS. BAGGIO: That's correct, Your Honor.

3 THE COURT: What?

4 MS. BAGGIO: Well, that's what we're asking for,
5 disclosure of whatever minimization procedures or filter
6 team protocols are being used to prevent the dissemination
7 of privileged communications to the prosecution team. So
8 that leads to the second category of materials sought in
9 this case.

10 Does that answer your question, Your Honor?

11 THE COURT: Right. If I understand it, you want
12 to know what the current protocol is, and then -- really if
13 we -- even without knowing what it is, we can imagine two
14 scenarios, can't we? One is that the protocol is entirely
15 adequate, there's just been failures of the protocol; the
16 second is that there have been acquisitions and disclosures
17 because the protocol itself is inadequate. Right?

18 MS. BAGGIO: I agree, Your Honor.

19 THE COURT: And so you want to know which it is.
20 And if the protocol is entirely adequate, what happens --
21 what has happened is that there have been failures to follow
22 the protocol, then what happens going forward with that
23 scenario? You just request better training or what do you
24 do?

25 MS. BAGGIO: Well, I would suggest that if the

1 problem is in the execution, then we need additional
2 procedures. Then there's been a breakdown in the system
3 somewhere.

4 THE COURT: Well, that's an answer only a lawyer
5 could love: The procedures are adequate, they have failed,
6 but we need more procedures. There's got to be a better
7 answer than that, doesn't there? So the procedures are
8 adequate but there's been human failure. What is it that
9 you think the defense would want to do about that?

10 MS. BAGGIO: Well, I think if you look at the four
11 corners of the procedure, it might only come to light what
12 the problems are. It might refine until you look at the way
13 it's been executed, and then maybe the vagueness of a term
14 or the lack of an independent review would come to light;
15 and then, in effect, it is the execution that would give
16 light to what the actual problems within the four corners
17 are.

18 THE COURT: All right.

19 MS. BAGGIO: So as to our request for the
20 disclosure of those minimization and filter team procedures,
21 I start with our position that the minimization procedures
22 and filter team protocol are not work product, and the FISA
23 minimization procedures are obviously an essential and
24 important part of first the FISC's review of an application
25 by the Government, as well as this Court's review of an

1 application and orders in a particular criminal case. It's
2 thought of and it is contemplated by the statute itself and
3 we believe that those are not privileged work product.

4 As to the filter team -- Yes, sir?

5 THE COURT: I'm not sure I understand why not.
6 You said that they're not work product because they're
7 required by the courts?

8 MS. BAGGIO: Because they are part of the request
9 that's submitted by the Government, and the Court reviews
10 them initially, as the FISA statute itself talks about what
11 the minimization procedures --

12 THE COURT: That's what I'm asking. Is it because
13 they're disclosed to the Court by third parties that they
14 cannot be work product? Is that your argument?

15 MS. BAGGIO: No, sir. I would say that's step
16 one, that it's part of establishing the lawfulness of the
17 process. And when there's a problem with the minimization
18 procedures as contemplated within FISA, a motion to suppress
19 may lie if the minimization procedures were not followed or
20 if they're flawed themselves. And therefore, it's our
21 position that that means they're not work product because
22 they can't -- the failure to follow them would be a basis to
23 suppress the evidence.

24 THE COURT: All right.

25 MS. BAGGIO: And then the filter team protocol,

1 it's our position that, as evidenced in other cases, the
2 Court can provide very valuable input into the propriety and
3 execution of filter teams, and that -- that as evidenced in
4 our papers and multiple -- and more than once the Court has
5 ordered a change in a filter team protocol proposed by the
6 Government in order to make it lawful.

7 And we would rely on that as evidence for why the
8 filter team protocols are not generally work product, but I
9 think even more so here, Your Honor, we're not just doing a
10 run-of-the-mill we want this information. We have the
11 record in this case that proves that the protocol and
12 minimization procedures are both material and relevant and
13 necessarily -- and require disclosure because of the process
14 in this case.

15 And I would rely first on the evidence related to
16 the January 2010 phone call. I got this -- these facts from
17 the Government's response at 3. And what we have here is
18 the order of events, as best as I could discern them, that
19 No. 1, the defendant is turned away from a flight at
20 Portland International Airport on January 20th of 2010. The
21 following day he makes an eight-minute phone call to his
22 attorney to discuss this situation. There is an initial
23 seizure of that communication, by whom I don't know. It
24 apparently -- again, as I understand the FISA seizure
25 process, there is no minimization at the time of seizure.

1 That seizure instead happens at the initial review, which I
2 have labeled as step 5. Who conducts that, I don't know,
3 but what we do know is that that phone call between Mr. Khan
4 and his attorney was not minimized. It was flagged as
5 potentially privileged but we know not by whom. Was it by
6 the case agent? If so, I say good for him, I'm glad that he
7 identified it as such, but on a process level, I submit that
8 it shouldn't be the case agent who would be reviewing the
9 information for potential privilege.

10 The Government's response then says that it was
11 sent to someone outside the prosecution team, who then
12 deemed it not to be privileged. The communication was sent
13 to the prosecution team itself and the prosecution team
14 finds that it is privileged. The prosecution team then
15 keeps the call and turns it over eventually to the defense
16 in discovery.

17 Your Honor, I think that this -- this sequence of
18 events establishes flaws in both the minimization procedures
19 and the filter team protocol.

20 The second communication that we have as evidence
21 of both the flawed minimization and filter team protocol
22 relates to the January 2012 communication. Here we know
23 there's a January 2012 communication, that it's seized, that
24 it's not initially minimized, but upon review -- in this
25 case, as I understand it, it wasn't minimized and it was not

1 identified as potentially privileged, and some amount of the
2 contents was relayed to the case agent.

3 The communications were later deemed potentially
4 privileged, but I know not by whom. Perhaps it was the case
5 agent. And if so, again, I say thank you for that, but
6 that's not the place where it should have happened.

7 The communication is then sent to the filter
8 team -- we don't know when -- and the filter team reviews
9 it, deems it privileged and keeps the call. Again, the
10 filter AUSA turns the communications over to the defense
11 over two years later.

12 So our position is this is another example of the
13 facts on which the Court can find that the minimization
14 procedures and filter team protocol in this case are flawed.

15 This establishes, Judge Mosman, that these
16 materials are material to the defense. Just as the
17 existence of privileged communications in the hands of the
18 Government are relevant and material to what we are doing on
19 behalf of Mr. Khan, so too are the mechanisms by which those
20 communications were seized by the Government.

21 The Government took the position in its response
22 that we can just move to suppress the call, but I submit,
23 Your Honor, that in order to adequately litigate the past
24 seizures and prejudice resulting therefrom, we need to know
25 the full process.

1 And moreover, as discussed earlier, because
2 there's a threat of future dissemination of communications,
3 just allowing suppression of the past seizures doesn't
4 address the threat of future seizures, and that's why
5 disclosure is warranted.

6 THE COURT: Let's walk through that for just a
7 minute because I want to understand the, I think, two or
8 three arguments you're making on this point.

9 The Government's response really is -- let's
10 assume for a minute that looking backwards and going
11 forwards, what happens is every time privileged
12 communications are acquired, that they are also then
13 disclosed to you. Let's just assume that happens then.

14 I think the Government's position is that if you
15 get that, if they give you every time they acquire
16 privileged communications, then you'll be able to do the two
17 main things you said you wanted to do with this stuff at the
18 outset: either suppress it or, if you see a pattern of it,
19 use it as a motion to dismiss.

20 It seems you've suggested that maybe there is more
21 than that you'd like to be able to do with this material, or
22 at least more concerns than that are raised by the
23 acquisition itself. Am I right about that?

24 MS. BAGGIO: Yes, sir.

25 THE COURT: So I hear you saying that in addition

1 to seeking to suppress specific communications or use them
2 as a basis to dismiss, the other concern that's being raised
3 that isn't solved by post hoc litigation is the chilling
4 effect that it will have on your preparations for trial.
5 That's one, right?

6 MS. BAGGIO: That's correct.

7 THE COURT: And if I understand correctly, the
8 second concern you raise is that in addition to suppression
9 and dismissal for -- dismissing the charges for the
10 acquisition of privileged communications, there's another
11 piece of litigation you'd like to engage in, and that's a
12 motion challenging the sufficiency of the minimization
13 procedures themselves?

14 MS. BAGGIO: That's correct.

15 THE COURT: And the resolution of that motion is
16 different minimization procedures?

17 MS. BAGGIO: I'm sorry. The resolution of that
18 motion --

19 THE COURT: If you file a motion saying that the
20 minimization procedures that you learn about are inadequate,
21 then what's the best result for you out of that? Better
22 minimization procedures or dismissal?

23 MS. BAGGIO: Well, I think the FISA statute says,
24 Your Honor, that that would be a basis to move to suppress
25 both the evidence of the calls themselves and anything that

1 derived from that evidence.

2 THE COURT: All right. Am I missing anything
3 else? So your answer to the Government's position is that
4 you want to do more than just suppress known acquisitions or
5 move to dismiss based on known acquisitions. You want to
6 move forward without any concern that it's happening, and
7 you want to be able to litigate the sufficiency of the
8 procedure, not just the legality of the acquisitions?

9 MS. BAGGIO: That's correct.

10 THE COURT: Thank you.

11 MS. BAGGIO: The other problem that has arisen for
12 me, Your Honor, is in the context of preparing this
13 argument, I believe there is now a real question about how
14 the executive branch views privilege, and that is beyond the
15 statutory question. That's a question of constitutional
16 magnitude. In reviewing the 2011 NSA FAA minimization
17 procedures, which I was reviewing in preparation for the
18 argument because we don't know which minimization procedures
19 were actually used, I took notice of Section 4, which is
20 defined as acquisition and processing attorney-client
21 communications. This minimization procedure states that a
22 communication -- the communication is between a person --
23 I'm sorry. "As soon as it becomes apparent that a
24 communication is between a person who is known to be under
25 criminal indictment in the United States and an attorney who

1 represents that individual in the matter under indictment,"
2 and then it goes on to say you cease monitoring.

3 Well, Your Honor, I submit that that definition
4 under Section 4 is much, much more narrow than the
5 definition of attorney-client privilege. This to me reads
6 more like a traditional conservative definition of a right
7 to counsel under the Sixth Amendment.

8 And the Government may say, oh, but that's the
9 2011 NSA minimization procedures. This is different.

10 But when I was reviewing their response, they
11 state at three different places in that response that
12 Mr. Khan was not under criminal indictment at the time the
13 information was collected, suggesting to me that the
14 Government may be embarking on the same mistake of law
15 regarding the definition of privilege.

16 Disclosure is needed to address a past mistake of
17 law resulting in seized privileged communications but also
18 to avoid future seizure of privileged communications.

19 When I'm trying to understand what a minimization
20 process should look at, I took a look at what we typically
21 see under Title III wiretaps. I understand this isn't Title
22 III, but we have typically a seized communication that's
23 either clearly pertinent and non-privileged, "Bring the
24 drugs to my house tomorrow," and that communication is given
25 over to the prosecution team right away, or it's a

1 communication that's clearly non-pertinent, "Hi, Grandma,
2 happy birthday," in which case the communication is either
3 minimized and not recorded or destroyed later, or we have --
4 in the minimization procedures under Title III, they take
5 into account the importance of the questions of privilege in
6 communication, whether it's attorney-client, doctor-patient,
7 husband-wife or clergy-communicant. And it gives specific
8 instructions as to how to handle those different types of
9 privileged communications: to turn it off if that's an
10 attorney-client call, or at least minimize it absent some
11 reason to be concerned that there's an exception to the
12 privilege.

13 Okay. I understand that's Title III and we're
14 dealing with a FISA minimization procedure, but the
15 legislative history of FISA states that "The minimization
16 procedures are vital safeguards because they regulate the
17 acquisition, retention, and dissemination of information
18 about U.S. persons."

19 And the legislative history -- and this is at
20 Senate Report 95-701. "The minimization requirement of this
21 paragraph is meant generally to parallel the minimization
22 provision in existing law," and then it cites the wiretap
23 minimization.

24 I submit, Your Honor, this is a fair framework
25 within which the Court and hopefully the defense will have

1 access to review the minimization procedures to gauge the
2 constitutional sufficiency.

3 Coming back to my question, how does the
4 Government review privilege -- I'm sorry, view privilege,
5 when -- in looking at the way the Government may be defining
6 it, and trying to understand both the minimization
7 procedures from the NSA and the Government's response, I
8 looked at the Kris and Wilson book on privilege, "National
9 Security Investigations and Prosecutions."

10 And this paragraph stands out to me, Your Honor.
11 It says in Section 28-6, "Privileges are generally
12 considered evidentiary; that is, a privileged communication
13 may not be introduced in a trial or other proceeding.
14 Privileges are not based in the Constitution, however, and
15 are generally not thought to prevent all uses of information
16 contained in the privileged communication. Moreover, the
17 privilege applies only to the communication itself, not to
18 the information in the communication or information derived
19 from the communication."

20 This -- this definition would be consistent with
21 the Government's response and the NSA minimization
22 procedures. And I submit, Your Honor, if that's what
23 they're doing, this is a very big constitutional issue and
24 requiring further disclosure of the underlying documents.

25 THE COURT: I'm going to pause you there, just

1 because I think I have the gist of your argument and I need
2 to hear from the prosecution in the time that we have
3 remaining.

4 MS. BAGGIO: Sure.

5 THE COURT: You've raised enough issues for them
6 to spend some time on.

7 Mr. Knight.

8 MR. KNIGHT: Thank you, Your Honor.

9 I think what I will do is break this down into a
10 discussion of the protocols and procedures as they relate to
11 managing privileged communications; and then secondly
12 discuss the arguments related to the existence of privileged
13 communications.

14 First, Your Honor, and at the outset, I should
15 note that the way the Government views this issue and the
16 way it framed it in its response is that when we're
17 discussing procedures and practices for dealing with
18 privileged information, we view there to be materials that
19 may be responsive to that request that are not related to
20 FISA, in the sense that they are procedures or practices
21 undertaken by prosecution team members in the course of the
22 investigation to manage that material, and then there are
23 materials specifically attendant to FISA minimization
24 procedures that may be subject to litigation under Section
25 1806(f) of FISA as other documents.

1 And we've broken those apart because the latter
2 would require and likely cause the Government to assert a
3 claim of privilege from the Attorney General over those
4 documents and the disclosure of those documents. I think
5 that speaks to the desire to obtain specific FISA
6 minimization instructions and procedures. That's how the
7 Government has approached these two issues.

8 THE COURT: What's your position now on the first
9 of those two?

10 MR. KNIGHT: On the first of those two, Your
11 Honor, is really twofold, and I think what should inform the
12 Court's analysis of this question is an issue raised by the
13 defense, and that is there is this underlying assumption
14 that there is an ongoing acquisition or monitoring of
15 privileged communication. There is nothing in the discovery
16 or in any of the pleadings, other than what I would frankly
17 call speculation based on the fact this is a national
18 security investigation, to suggest that's the case.

19 And that's important because if I'm understanding
20 the argument, part of the reason the defense is seeking the
21 minimization or filter protocols is to ensure that they are
22 complied with effectively and efficiently going forward.
23 And to the extent there is no ongoing acquisition of
24 privileged material or evidence of it, the notion that the
25 defense would need the filter protocols is made moot.

1 Now --

2 THE COURT: Well, I want to be precise about what
3 I think you're saying. If you're saying that the particular
4 authorized FISA targeting of Mr. Khan as a target, a subject
5 of a FISA investigation has ended and you're no longer using
6 FISA surveillance techniques to listen in on his
7 conversations, fair enough. That doesn't quite answer at
8 least one of the concerns raised by the defense, which is
9 the idea that there's some other target of some other
10 investigation that would result in, say, Ms. Baggio's phone
11 calls to somebody in Pakistan or the Maldives being
12 acquired.

13 So wouldn't that be the case -- let's just start
14 there -- that your assurance that it's ended in this case
15 would not prevent at least the possibility of privileged
16 communications being acquired in some other investigation
17 but involving this defense team and this defendant?

18 MR. KNIGHT: Well, at the outset, I should say
19 Mr. Khan received notice that he's an aggrieved party under
20 FISA, and we believe we will handle specifically legal
21 issues related to his status as an aggrieved party in that
22 part of litigation.

23 As to Ms. Baggio's concern that there may be
24 overlapping investigations that may capture her
25 communications, really two responses: One, it's a

1 speculative argument, and I don't think it's any more likely
2 to be a concern in this case than many others. And for
3 example, Your Honor, there are often scenarios or cases
4 where a defense attorney or investigator in a non-national
5 security setting will contact a third party or an
6 investigator will contact a third party and that information
7 finds its way back to a prosecution team.

8 So the spectrum of a national security case
9 doesn't present us per se with issues that require the Court
10 to order some different protocol or practice in this case.
11 I think that gets back to what they're seeking, which are
12 the protocols or procedures undertaken in this case.

13 Now, I can assure the Court --

14 THE COURT: I just want to start there. Your
15 answer then is, in part, in a non-national security case, a
16 non-FISA case, a -- let's take a Title III case. The Title
17 III ends, everyone knows it's over with, but some
18 investigative team not in Oregon but in California is up on
19 a related drug organization; and in the course of
20 interviewing witnesses, your argument is that a defense
21 attorney here in Portland could end up talking to someone
22 who is a witness or involved in some other Title III in
23 California, and that conversation could have a number of
24 things happen to it, including acquisition by investigators
25 in California, right?

1 MR. KNIGHT: Absolutely.

2 THE COURT: And so if I understand your argument,
3 it's a risk that defense attorneys face all the time in FISA
4 or non-FISA cases, and the answer isn't review the protocol,
5 the answer is figure out what to do with those acquisitions.

6 MR. KNIGHT: Well, that's correct. And I don't
7 mean to belittle the concern of the defense, but it gets
8 back to the question of what is the Government legally
9 obligated to disclose. And if the question is before the
10 Court should the Government disclose the filter team
11 protocols and practices employed in the non-FISA context in
12 this investigation, we believe that to be separate from a
13 scenario the Court has just identified that exists in most
14 post-indictment investigative -- defense investigative stage
15 cases, where there may be activities that are learned of by
16 third parties.

17 Now, the Government has submitted to the Court
18 ex parte and under seal, because it believes the material is
19 work product, as it has separately identified in its
20 response, steps it believes it has taken to address
21 reasonably foreseeable circumstances relating to work
22 product and privileged communications. And to that extent,
23 what the Government believes is it has acted in a manner
24 that is responsible and careful.

25 But the notion that it may --

1 THE COURT: I'm still trying to sort through this
2 T3 analogy here. I guess part of what concerns me about it
3 is that if -- if this were a drug defendant and the concern
4 Ms. Baggio had was she's afraid to call anybody in
5 Sacramento for fear she may end up on a Sacramento wiretap,
6 that's sort of the analogy to her concern here.

7 I guess you're saying the answer is you might, but
8 isn't the answer to that sort of we know what the protocol
9 will be for T3s in Sacramento to prevent that from
10 happening?

11 MR. KNIGHT: But I think two things, Your Honor:
12 One is that the nature of this argument -- and this
13 dovetails with discovery arguments as well -- is
14 speculative. I mean, I understand the concern --

15 THE COURT: Well, isn't it a little less
16 speculative in this case than it might be, since we have the
17 FPD investigator's work product, interviews of witnesses in
18 *Mohamud*?

19 MR. KNIGHT: Well, but I don't think -- I think
20 that's a separate question. That's work product which the
21 Government doesn't believe is necessarily privileged in that
22 context. When an investigator talks to a third party,
23 that's different than attorney-client privileged
24 communications, which I hear to be a concern.

25 And I think to answer the Court's question, last

1 question, it is that the Government can represent to the
2 Court that it is aware of this concern about overlapping
3 investigations and has cautioned and discussed that if it
4 were to arise or if those communications were to be heard
5 about, to take appropriate steps and contact or direct that
6 material away from the prosecution team.

7 But without knowing -- we're operating in a sort
8 of speculative universe of what they're concerned may
9 happen, and we don't have a specific manner or way to
10 address something that's that attenuated.

11 THE COURT: What's your response to the argument
12 that the chronology of events in this case for the
13 acquisitions here creates at least a reasonable inference of
14 a flawed protocol?

15 MR. KNIGHT: Well, the Government has conceded, I
16 think, two things. One, the chronology supports the
17 Government's position as it relates to disclosure because
18 many of the cases cited by the defense relate to Sixth
19 Amendment and the post-indictment acquisition and management
20 of privileged communications. We're talking about material
21 that is preindictment and relates to attorneys that do not
22 currently represent defendant.

23 Now, as to the flawed protocol, the Government
24 readily concedes --

25 THE COURT: Well, let me just get back to that

1 point. Are you saying -- what am I to make of that fact?

2 The defendant called an immigration lawyer and spoke and
3 that's okay? That's not privileged --

4 MR. KNIGHT: No, not at all.

5 THE COURT: -- if it's preindictment?

6 MR. KNIGHT: Well, if the argument is in fact that
7 there is a due process violation -- and their motion raises
8 the specter of constitutional concerns with the acquisition
9 of that material. The law is quite clear, I think, on the
10 fact that the preindictment communications may raise a
11 different issue about what violates a Sixth Amendment right
12 to counsel than acquisition or management of post-indictment
13 communications.

14 THE COURT: Well, were the acquisition of those
15 conversations or communications improper under the statute?

16 MR. KNIGHT: I'm not going to speak to the FISA
17 minimization procedures. We believe those are properly
18 handled under 50 U.S.C. 1806(f) if a claim of privilege is
19 filed.

20 I will say in response to the Court's question
21 about a flawed protocol that our position is that the
22 protocol itself was not flawed, in the sense that the
23 materials were identified as potentially privileged, but the
24 substantive determination was wrong. I think it's without a
25 question that the communication identified and produced in

1 discovery was indeed a privileged communication, and it
2 should have been, when it was identified by the filter
3 protocol in place, it should have been kept separate from
4 the prosecution team.

5 I think the question then becomes remedy and what
6 steps going forward need to be taken. And that is why the
7 Government has undertaken to provide all of -- and this gets
8 us, I think, into the second question and category raised by
9 the defense, and that is the existence of privileged
10 communications.

11 THE COURT: Go ahead.

12 MR. KNIGHT: The question then becomes what to do
13 with this material and what remedy is available to
14 defendant.

15 The existence of privileged communications, the
16 Government has undertaken an effort to ensure now, because
17 of the concerns raised, that defendant has all of the
18 privileged communications acquired during the investigation.

19 Ms. Baggio raised three categories in her
20 PowerPoint of privileged communications that may exist. The
21 first were ones in possession of the prosecution team, the
22 second were those in possession of the filter team, and the
23 third were privileged communications potentially possessed
24 by others. And I think that gets into the questions the
25 Court posed to Mr. Gorder earlier about what other entities

1 may possess privileged material.

2 I'll speak to the first two categories because
3 they relate to the representations the Government has
4 already made to the Court. The defense has been provided
5 with all privileged communications acquired in the
6 investigation of defendant possessed by the filter team or
7 that the prosecution team has seen.

8 The Government has also provided the degree of
9 exposure or taint of those materials.

10 THE COURT: Meaning what?

11 MR. KNIGHT: Meaning the Government has explained
12 and made available the case agent to explain who has seen
13 what on the prosecution team and to what degree they had
14 knowledge about the contents.

15 And I think the meaning of that is important
16 because it gives the defense, without any litigation on that
17 subject, an opportunity to make any argument they'd wish in
18 a motion to dismiss regarding a substantive due process
19 violation -- or a procedural due process violation. So
20 that's been provided.

21 So speaking to those two categories, they have the
22 privileged communications.

23 Now, there's this third category. They may want
24 other communication. It's a confusing request because it
25 seems to me that if we're not aware of other communications,

1 it would -- I don't understand why then the defense would
2 either want access to them -- the Government has a discovery
3 obligation, and they certainly will get anything that is
4 discoverable, but then why the Government should seek to
5 acquire additional privileged communications from any other
6 entity, it seems like an odd request as it relates to either
7 remedy or discovery, and I'm not sure what to say to the
8 Court when the question is raised that they want all
9 communications in possession of other entities.

10 THE COURT: So, I mean, if we just speculate for a
11 minute not about the future but about the past, in the
12 future what Ms. Baggio said was one of her concerns is that
13 there would be a related or even unrelated investigation
14 that would somehow cause her conversations with someone, you
15 know, in the Middle East to be acquired, so -- and that
16 could be by agencies unrelated to this investigation and
17 prosecution.

18 If that has happened in the past, you're
19 suggesting that the best course is, since you don't know
20 anything about it, to just leave it alone, not learn about
21 it, not acquire it as a prosecution team in order to
22 disclose it, but just leave it alone?

23 MR. KNIGHT: Well, first I want to say that the
24 Government has made inquiries of other agencies about
25 material related to this case. So I -- the notion that

1 there may be lots of privileged material out there I think
2 is speculative at best. The Government has provided the
3 material it has.

4 THE COURT: That's always a -- I'm not sure that
5 argument is going to have as much weight as you want it to,
6 because defense counsel in its position can really only make
7 speculative arguments. So you can't make them make
8 speculative arguments and then knock them down by saying
9 they're speculative.

10 MR. KNIGHT: No, but the Government can say with
11 specificity what it has done to comply with its obligations.

12 THE COURT: You have reached out as best you know
13 how to not just the FBI in this investigation but wherever
14 else you think that might likely be found to disclose
15 whatever you think is reasonably obtainable by you out
16 there?

17 MR. KNIGHT: Absolutely.

18 And second of all, Your Honor, I don't think
19 there's any controlling legal authority nor do I think it's
20 really appropriate for the Government to affirmatively seek
21 out privileged communication that may be in the possession
22 of some entity. I mean, that -- that's totally separate
23 than a discovery request, and that would seem to be creating
24 and inviting a situation where this defendant's due process
25 rights may get violated.

1 THE COURT: All right. So as to the past, you
2 believe you've disclosed everything that's out there that
3 could legitimately be obtained by you?

4 MR. KNIGHT: Yes.

5 THE COURT: And anything else that's out there, if
6 there is any such thing -- which you doubt -- you'd just as
7 soon never see it or touch it?

8 MR. KNIGHT: As a member of the prosecution team,
9 I think it's my obligation to neither see it or touch it.
10 And I think --

11 THE COURT: I'm just making sure that's your
12 position.

13 MR. KNIGHT: Yes.

14 THE COURT: It's possible, I suppose, that
15 something like that from the past is out there; and you
16 think the best remedy, if that ever did happen, since you
17 tried to acquire all of it, is to just leave it where it is?

18 MR. KNIGHT: Yes. But that's suggesting it's
19 there, but yes. And I think --

20 THE COURT: I'm not saying you'd know of
21 something, but that's your answer. If you were to go out
22 and look and find more, you think that would be a mistake
23 compared to just leaving it alone?

24 MR. KNIGHT: Yes, if it's not discoverable and
25 it's privileged.

1 And I think this speaks to the remedy question the
2 Government raised in its response that I do not believe is
3 thoroughly addressed in the reply, and that is what is the
4 purpose of seeking this material from the Government? Where
5 does it get this defendant ultimately?

6 THE COURT: Well, the past we understand. The
7 purpose is to suppress it or create a pattern of activity
8 that could result in dismissal of the charges, right?

9 MR. KNIGHT: But I think that can be accomplished
10 with disclosure solely of the items that have been
11 disclosed.

12 THE COURT: All right. Fair enough.

13 And then as to the future, I'm sort of recapturing
14 in my own mind the argument you've made. As to the future,
15 your contention is that given your statement publicly on the
16 record here that there are no ongoing acquisitions against
17 this defendant -- is that what you said publicly?

18 MR. KNIGHT: No, Your Honor. As I said, this
19 defendant has been given notice that he is an aggrieved
20 party under FISA. The Government will litigate questions of
21 FISA separately.

22 However, there is no indication or evidence that
23 this defendant -- or privileged communications have been
24 obtained, other than those in the past. The Government has
25 not publicly said one way or the other that -- there's no

1 reason to believe that's happening. It gets into one of
2 these scenarios where the Government is being told to prove
3 a negative, and we've told the defense repeatedly.

4 THE COURT: I guess I'm not at all sure where that
5 leaves us. Ms. Baggio said -- one of her worries is that in
6 representing client and in talking with other people that
7 her privileged communications could be acquired either by
8 unrelated investigations or by this investigation. That's
9 what she said.

10 And your answer to the second one, this
11 investigation, is don't worry because why?

12 MR. KNIGHT: Well, in part the Government has
13 addressed this in its classified pleading, we believe.

14 THE COURT: I'm just trying to get your public
15 response.

16 MR. KNIGHT: That just presuming that the
17 Government is monitoring on an ongoing basis
18 post-indictment, which I understand the argument is, there's
19 no basis for it. I mean, there was an investigation in a
20 discrete period of time. There was obviously
21 court-authorized --

22 THE COURT: That's the same tautology we discussed
23 a minute ago: There can't be a basis for it, all she can do
24 is wonder.

25 MR. KNIGHT: I don't think so. I mean --

1 THE COURT: What would be the basis for her
2 suggesting there's an ongoing investigation that she's
3 worried about?

4 MR. KNIGHT: What would be the basis?

5 THE COURT: Yes.

6 MR. KNIGHT: I don't think is there one. That's
7 precisely the Government's --

8 THE COURT: I know you don't think there is one.
9 I'm saying how could there be one. What defense attorney
10 could ever make a nonspeculative argument about this point?

11 If they're worried that they're being acquired and
12 they don't have any reason to know one way or the other
13 whether they're being acquired or not, so they raise the
14 issue and say, please don't acquire my conversations with my
15 client, then it seems a little tautological to say, well, I
16 appreciate your point, but you've raised no reason that you
17 have in your possession, defense attorney, for believing
18 that it's happening. They would never know one way or the
19 other.

20 MR. KNIGHT: Well, two points. That's not
21 necessarily the case. I mean, I think the Government is
22 hamstrung by the existence of classified information, the
23 manner it's managed.

24 I think secondly, there is no precedent or
25 suggestion that the Government in any criminal case on an

1 ongoing basis -- and getting back to the Court's Title III
2 analogy -- continues to monitor in some circuitous way
3 communications between an attorney and a defendant.

4 THE COURT: All right. So that's your answer as
5 to why the concern raised about future acquisition shouldn't
6 result in disclosure in this case.

7 And your answer to why -- the concern raised about
8 the potential for future acquisition in other cases, the
9 hypothetical Ms. Baggio gave us about either she or I
10 suppose her investigator calling someone in the Maldives
11 about this case, your answer to that, if I understand what
12 you've said publicly here on the record today is that what?
13 Help me with that. Why shouldn't she be worried about the
14 possibility?

15 I think you've said that you reached out to try to
16 make sure that guarantees are in place that you, the team,
17 will never see that kind of thing.

18 MR. KNIGHT: Well, it's twofold. First, the
19 speculation is not an insignificant concern here, because
20 when we talk to law enforcement about what to look out for,
21 what to ensure is kept separate from prosecution team
22 members without any clear parameters about what to look for,
23 it is speculation. But we have taken steps to say -- to
24 ensure that communications aren't directed, in any
25 reasonable way that we can foresee, to prosecution team

1 members.

2 The second issue is -- and this gets back to work
3 product, which is different, we believe, than
4 attorney-client communications, which are privileged in a
5 different way. If Ms. Baggio or an investigator contacts a
6 third person, and that third party in turn contacts somebody
7 else and that information gets back to the Government, the
8 Government does not concede, as the initial PowerPoint
9 suggested, that that is somehow privileged material. That's
10 an entirely different issue. And that's the scenario, we
11 believe, when you remove the layer of national security off
12 of this case and look at any criminal investigation, it does
13 occur sometimes where an agent goes and talks to an
14 affiliated gang member, or a lawyer does, representing the
15 defense or investigator, and says, hey, tell us what
16 happened, and that conversation is overheard. That
17 conversation is related to a third party.

18 THE COURT: I understand your point. If you -- if
19 a defense investigator talks to a co-conspirator in a drug
20 conspiracy and writes up a report for the defense attorney
21 in the case, and that same person decides to talk to an FBI
22 agent or DEA agents, then the work product isn't covering
23 the subsequent conversation between the co-conspirator and
24 the DEA agent, it covers just the initial work product of
25 the memo or other product from the first, right? That's

1 your point?

2 MR. KNIGHT: Yes.

3 THE COURT: And that can happen in this case in
4 the same way. At least that's your argument, right?

5 MR. KNIGHT: Absolutely.

6 THE COURT: And that, as far as I can tell, is not
7 just your argument about work product but it's also the
8 argument you're making about privilege?

9 MR. KNIGHT: Well, I think --

10 THE COURT: If Ms. Baggio calls a witness in the
11 Maldives, and that conversation is privileged but -- or
12 might be, but that witness can call whoever he or she wants,
13 right?

14 MR. KNIGHT: Well, privileged -- we view the
15 attorney-client privilege a little differently than what
16 would be classified as a work product privilege. And I
17 think obviously that's an area where she's calling somebody
18 in the Maldives, the factual analysis then depends on is
19 that communicated to a third party and what's the nature of
20 that initial call.

21 THE COURT: So you'd have higher concerns about
22 anybody with the prosecution team having any conversation
23 with that witness about what he and Ms. Baggio discussed?

24 MR. KNIGHT: Yes. And then even I would say
25 higher concerns because of what the law is about the

1 acquisition or even awareness of contacts between attorneys
2 and their clients, which is why the work product issue has
3 been sort of conflated in the motions a little bit in its
4 difference.

5 THE COURT: All right. Thank you.

6 Ms. Stephens, what time is the next hearing?

7 THE CLERK: 3:00.

8 (There is a pause in the proceedings.)

9 THE COURT: Mr. Bailey, are you okay for a little
10 bit? You're getting paid, right?

11 MR. BAILEY: I'm just coming to watch, Judge.

12 THE COURT: All right.

13 Ms. Baggio, go ahead.

14 MS. BAGGIO: Your Honor, just briefly, if I could
15 address the last item covered first.

16 I agree. There's a completely -- the work product
17 about which I'm concerned are my direct communications with
18 a potential witness. If that witness decides to pick up the
19 phone and call the FBI and tell them what we talked about,
20 they can do that. My concern is the surreptitious
21 surveillance of those communications.

22 THE COURT: The initial conversation?

23 MS. BAGGIO: That's correct, Your Honor.

24 The concern I have with the Government saying if
25 we ask, then that's going to -- about the existence of

1 additional communications, that's going to provide a
2 problem, we're inviting the dissemination of the privileged
3 communication, I think that would be sort of an ostrich
4 approach to a real problem. And if I understand the way the
5 information sharing goes, without a proper prophylactic
6 order in effect that can prevent that information from
7 reaching the prosecution team, then it could be that it
8 would be transmitted as helpful evidence related to a crime.
9 So that's our concern, a prophylactic effect or an order
10 that would prevent that dissemination from happening.

11 But otherwise, Your Honor, I feel clear that you
12 understand our questions and concerns.

13 THE COURT: All right. Thank you.

14 One last matter, Mr. Knight or Mr. Gorder -- I'm
15 not sure who will take this up. Do I understand CIPA
16 correctly that one possibility -- and I'm merely raising it
17 as a possibility at this point -- is for the United States
18 to produce a publicly available summary of evidence?

19 So in a trial, for example, where there was an
20 interview of a witness that was classified, one possibility
21 under CIPA is to produce a summary of the otherwise
22 classified interview material and see if that will fly for
23 trial, see if that is a usable alternative.

24 Is that possibility available for the protocols
25 themselves, which I think Ms. Baggio at least views as

1 evidence of a potential statutory violation?

2 MR. KNIGHT: I -- walking through the steps of
3 CIPA, I think it's a possibility. The first step would be
4 the Government would likely claim a privilege over the
5 classified material, and then I think we may get to the
6 point, depending on the Court's rulings, where a
7 substitution is deemed necessary. I think that is indeed a
8 scenario that could play out under CIPA with this material.

9 THE COURT: "Substitution" meaning that after a
10 series of intervening events, what would be contemplated
11 would be that the Government would attempt, at least, to
12 construct a nonclassified summary of its protocols and taint
13 team procedures?

14 MR. KNIGHT: That's right, in order to comply with
15 the Court's order after reviewing the initial presentation
16 under CIPA.

17 THE COURT: I'm sorry, tell me what that last part
18 means.

19 MR. KNIGHT: The substitution would be designed to
20 comply with the Court's order, likely rejecting the
21 Government's claim hypothetically that it's privileged and
22 should be deleted from discovery under Section 4 of CIPA,
23 then the substitution would be fashioned.

24 THE COURT: Thank you all.

25 I have a couple other matters, and in any event,

1 would like to think about this further rather than rule from
2 the bench.

3 Yes, sir?

4 MR. RANSOM: Your Honor, we do have just one very
5 quick matter --

6 THE COURT: Sure.

7 MR. RANSOM: -- and that is will the Government
8 give us this burned disc so we can send it to an expert to
9 have him --

10 THE COURT: I'm aware of the request. Having just
11 looked at it, what's the Government's position on that?

12 MR. KNIGHT: It's set out very clearly in the
13 emails that Mr. Ransom attached as exhibits. We absolutely
14 understand that they have a right to inspect any material in
15 our possession. What we've tried to do is facilitate an
16 initial step whereby the experts speak to one another, since
17 the evidence in question is what we believe to be an
18 intentionally burned and damaged hard drive that is
19 currently held as evidence. The defense has not given us
20 the name of an individual to --

21 THE COURT: What is it that you're suggesting we
22 do going forward?

23 MR. KNIGHT: I would just like the experts to be
24 able to talk to find out what the best way to test this is,
25 do we need to have them come to the FBI lab to do the kind

1 of test they want to do? Should the drive be taken to their
2 expert's lab separately?

3 But the request right now is that we put it in an
4 envelope and send it to an address, a P.O. box in
5 California, without any other information, and I don't think
6 that that either complies with the inspect requirement of
7 16(a)(1)(E) or would really be a responsible use of the
8 Government's stewardship of this case.

9 THE COURT: Are you willing to predate any actual
10 testing by a conversation between the Government's expert
11 and your expert?

12 MR. RANSOM: No. There's absolutely no reason for
13 that. They have a hard drive, it should be sent to our
14 expert. We've identified who the expert is.

15 I think if the Court later has an opportunity
16 really to look at the communications between myself and
17 Mr. Knight, you'll see what the problem is. Mr. Knight has
18 said he wants our expert to come to Portland to meet with
19 people here in Portland, discuss what it is the expert is
20 going to do, how he's going to analyze this, and then they
21 will give him perhaps the hard drive.

22 I've said, "This is a CJA case. We don't have the
23 money for that."

24 Mr. Knight said --

25 THE COURT: I will take a look at what's been

1 submitted. I suspect that if what you're actually asking
2 for is some sort of email or telephone conversation between
3 the two of them to try to work out the best handling of
4 this, then there is money for that. But I'll see what's in
5 the materials that have been submitted.

6 MR. RANSOM: Thank you, Your Honor.

7 And just one other matter.

8 THE COURT: Yes.

9 MR. RANSOM: I want the Court to know we haven't
10 forgotten that we have an obligation to the Court on another
11 CJA aspect. I'll take care of that.

12 THE COURT: Thank you very much. I look forward
13 to receiving it.

14 MR. RANSOM: Thank you, Your Honor.

15 THE COURT: We'll be in recess.

16 THE CLERK: This court is in recess.

17 (Proceedings concluded.)
18
19
20
21
22
23
24
25

--o0o--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

6/25/2014

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE